



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

1595 Wynkoop Street  
DENVER, CO 80202-1129  
Phone 800-227-8917  
<http://www.epa.gov/region08>

**Ref: 8ENF-L**

February 2, 2012

**GENERAL AND SPECIAL NOTICE LETTER  
URGENT LEGAL MATTER  
PROMPT REPLY NECESSARY  
CERTIFIED MAIL: RETURN RECEIPT REQUESTED**

Matthew K. Rose,  
Chairman and Chief Executive Officer,  
BNSF Railway Company  
2650 Lou Menk Drive  
Fort Worth, Texas 76131-2830

Re: General and Special Notice Letter concerning the Libby Asbestos Site in Libby, Montana

Dear Mr. Rose:

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the federal "Superfund" law, the U.S. Environmental Protection Agency (EPA) is responsible for responding to the release or threat of release of hazardous substances, pollutants or contaminants into the environment – that is, for stopping further contamination from occurring and for cleaning up or otherwise addressing any contamination that has already occurred. EPA has documented that such a release has occurred at the Libby Asbestos Site (the Site) located in Libby, Montana. EPA has spent public funds to investigate and control releases of hazardous substances or potential releases of hazardous substances at the Site. Based on information presently available to EPA, EPA has determined that the BNSF Railway Company (BNSF) may be responsible under CERCLA for cleanup of the Site or costs EPA has incurred in cleaning up the Site. Presently, EPA intends to ensure the conduct of further comprehensive investigations and characterization of the soils and other environmental media at Operable Unit 6, including all Libby Amphibole asbestos contamination on and from property owned by BNSF, BNSF rights-of-way and other properties associated with rail transport within the Site, including, but not limited to: the Troy bunker, the Amtrak station, rail lines, sidings, spurs, yards and areas impacted by any past derailments at the Site.

### **Explanation of Potential Liability**

Under CERCLA, specifically Sections 106(a) and 107(a), potentially responsible parties (PRPs) may be required to perform cleanup actions to protect the public health, welfare, or the environment. PRPs may also be responsible for costs incurred by EPA in cleaning up the Site, unless the PRP can show divisibility or any of the other statutory defenses. PRPs include current and former owners and operators of a Site, as well as persons who arranged for treatment and/or disposal of any hazardous substances found at the site, and persons who accepted hazardous substances for transport and selected the site to which the hazardous substances were delivered.

Based on a review of available information, EPA believes that BNSF may be liable under Section 107(a) of CERCLA based on operation of the railroad that served the former mine and processing areas. The railway corridor, known as Operable Unit 6 of the Site, is shown on the enclosed figure. The full nature and extent of contamination has not been defined at this time. This letter addresses response actions at Operable Unit 6.

EPA believes that BNSF may be liable under Section 107(a) of CERCLA as a current and/or previous owner and/or operator of Operable Unit 6 at the Site. The potential exists for contamination in surface and subsurface soil at OU6, possibly the result of spillage of vermiculite during rail transit.

### **Background**

The Libby Asbestos Site has been the focus of a number of environmental investigations and response actions. Areas investigated have included property owned by BNSF and along BNSF rights-of-way. BNSF has performed a removal action at the Railyard. EPA has reason to believe that sources of contamination are, at least in part, from properties, railroad tracks, and rights-of way owned, leased, and maintained by BNSF, as well as from various railroad operations performed at a number of locations at or near the asbestos mine facility at the Site.

### **Special Notice and Negotiation Moratorium**

EPA has determined that use of the special notice procedures set forth in Section 122(e) of CERCLA, 42 U.S.C. § 9622(e), may facilitate a settlement between BNSF and EPA for performance of a Remedial Investigation and Feasibility Study (RI/FS) at the Site. A Remedial Investigation (RI) identifies site characteristics and defines the nature and extent of soil, air, surface water, and groundwater contamination at the Site and the risks posed by the Site. A Feasibility Study (FS) evaluates different cleanup options for the Site.

Under Section 122(e), this letter triggers a sixty (60)-day moratorium on certain EPA response activities at the Site. During this 60-day period, BNSF is invited to

participate in formal negotiations with EPA in an effort to reach a settlement to conduct or finance the RI/FS. The 60-day negotiation period ends 60 days from your receipt of this letter. The 60-day negotiation moratorium will be extended for an additional thirty (30) days if, within the 60-day period, BNSF provides EPA with a "good faith offer" to conduct or finance the RI/FS. Negotiations for the RI/FS settlement will conclude at the end of the 90-day moratorium period, or earlier if EPA determines that a good faith offer was not timely submitted. If settlement is reached between EPA and BNSF within the 90-day negotiation moratorium, the settlement will be embodied in an Administrative Settlement Agreement and Order on Consent (Settlement Agreement and Order). If no settlement is achieved, or if a good faith offer is not submitted, EPA reserves all rights under the law to issue appropriate orders for conduct of the RI/FS or to take other authorized actions in connection with this matter.

### **Good Faith Offer**

A proposed Settlement Agreement and Order is enclosed to assist you in developing a "good faith offer." As indicated, the 60-day negotiation moratorium triggered by this letter is extended for 30 days if the BNSF submits a "good faith offer" to EPA. A "good faith offer" to conduct or finance the RI/FS is a written proposal that demonstrates BNSF's qualifications and willingness to conduct or finance the RI/FS and includes the following elements:

- A statement of willingness by BNSF to conduct or finance an RI/FS that is consistent with EPA's Statement of Work and draft Settlement Agreement and Order and provides a sufficient basis for further negotiations;
- A paragraph-by-paragraph response to EPA's Statement of Work and draft Settlement Agreement and Order;
- A detailed description of the work plan identifying how BNSF plans to proceed with the work;
- A demonstration of BNSF's technical capability to carry out the RI/FS, including the identification of the firm(s) that may actually conduct the work or a description of the process they will use to select the firm(s);
- A demonstration of BNSF's capability to finance the RI/FS;
- A statement of willingness by BNSF to reimburse EPA for costs incurred in overseeing BNSF's conduct of the RI/FS: and
- The name, address, and phone number of the party who will represent BNSF in negotiations.

### **Administrative Record**

In accordance with Section 113 of CERCLA, 42 U.S.C. § 9613, EPA will establish an Administrative Record containing the documents that serve as the basis for EPA's selection of the appropriate response action for OU6 at the Site. This Administrative Record will be located at EPA's Denver Office, 1595 Wynkoop St., Denver, CO 80202 and will be available to the public for inspection. The Administrative Record will also be available at an information repository located at the EPA Information Office, 108 East 9<sup>th</sup> St., Libby, MT 59923. Site documents are available for inspection at EPA's Libby, MT Office and at the EPA Denver Offices, Superfund Records Center, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202. You may wish to review the Site documents to assist you in responding to this letter, but your review should not delay such response beyond the 60-day period provided by CERCLA.

### **Response and EPA Contact Person**

You are encouraged to contact EPA by February 29, 2012, to indicate your willingness to participate in negotiations concerning this Site. If EPA does not receive a timely response, EPA will assume that you do not wish to negotiate to perform the RI/FS.

Your response to this Special Notice Letter, including written proposals to perform the RI/FS for the Site, should be sent to:

Rebecca Thomas  
Remedial Project Manager, Mail Code 8EPR-SR  
U.S. Environmental Protection Agency, Region 8  
1595 Wynkoop  
Denver, CO 80202  
With a copy to:

Lorraine Ross  
Legal Enforcement Program, Mail Code 8ENF-L  
U.S. Environmental Protection Agency, Region 8  
1595 Wynkoop Street  
Denver, Colorado 80202-1129

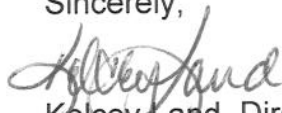
The factual and legal discussions in this letter are intended solely to provide notice and information, and such discussions are not to be construed as a final EPA position on any matter set forth herein. Due to the seriousness of the environmental and legal problems posed by the conditions at the Site, EPA urges that you give immediate attention and prompt response to this letter.

In addition, EPA has notified the State and Federal Natural Resource Trustees of its intention to perform or enter into negotiations for the performance of an RI/FS at the Site.

If you have any questions regarding the technical aspects of this letter, please contact Rebecca Thomas, Remedial Project Manager, at 303-312-6552. If you have an attorney handling your legal matters, please direct his or her questions to Lorraine Ross, Senior Enforcement Attorney, at 303-312-6888. If you have any other questions regarding this letter, you may contact Sharon Abendschan, Technical Enforcement Specialist, at 303-312-6957.

We look forward to continuing our work with BNSF at this site during the coming months.

Sincerely,



Kelcey Land, Director  
Technical Enforcement Program

And



Lorraine Ross,  
Acting Supervisory Attorney  
Legal Enforcement Program

Enclosures

1. Map depicting Operable Unit 6 at the Site
2. Proposed Settlement Agreement and Order and Statement of Work

cc: Richard E. Weicher  
Vice President and General Counsel, Regulatory,  
BNSF Railway Company  
2650 Lou Menk Drive  
Fort Worth, Texas 76131-2830

Dava Kaitala  
Senior General Attorney  
BNSF Railway Co.  
2500 Lou Menk, AOB 3  
Ft. Worth, TX 76131

David M. Smith  
Manager, Environmental Remediation  
825 Great Northern Blvd., Suite 105  
Helena, Montana 59601

